United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-4003

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4003

LUIS WALTERS-VALDEZ,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR THE RESPONDENT

UNITED STATES COURT OF APPEALS
FILED
JUL 9 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAUL J. CURRAN,
United States Attorney for the Southern District of New York,
Attorney for Respondent,
United States Court House Annex
One St. Andrew's Plaza,
New York, New York 10007.

THOMAS H. BELOTE,
Special Assistant United States Attorney.

NAOMI REICE BUCHWALD,
Assistant United States Attorney,
Of Counsel.

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4003

LUIS WALTERS-VALDEZ,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF FOR THE RESPONDENT

Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Luis Walters-Valdez ("Walters") petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on December 18, 1974. That order dismissed the petitioner's appeal from an order of an Immigration Judge following a hearing, finding him deportable under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2) as nonimmigrant who had remained longer than authorized, because he had entered the United States on January 22, 1972 as a nonimmigrant visitor for pleasure authorized to remain in the United States until February 25, 1972 and had remained in the United States beyond that date without authority.

The petitioner contends that the Board's decision should be set aside because the deportation order is the result of an allegedly illegal search and seizure.

Issues Presented

1. Whether petitioner's arrest violated his rights under the Fourth Amendment.

2. Whether, assuming petitioner's arrest to have been contrary to law such an arrest vitiates an otherwise valid order of the Board of Immigration Appeals requiring petitioner, a concededly deportable alien, to depart from the United States when that order was not based upon any evidence seized at the time of his arrest.

Statement of the Facts

The deportation proceedings

The petitioner is a 27 year old married alien, a native and citizen of Chile. He was last admitted to the United States at Miami, Florida on January 22, 1972 as a non-immigrant visitor for pleasure authorized to remain until February 25, 1972. He failed to depart according to the terms of his visa and has been illegally residing and employed in the United States since the expiration of his authorized visit (R. 6, pp. 1-4).*

The alien was apprehended by immigration officers on the morning of September 14, 1973, and on the same day the Immigration and Naturalization Service (the "Service") commenced deportation proceedings with the issuance of an Order to Show Cause and Notice of Hearing (R. 7). The

---

* References preceded by "R" are to the certified administrative record which has been filed with the Court.

order charged that Walters was deportable pursuant to Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2), as an alien who was admitted as a nonimmigrant visitor for pleasure and remained in the United States longer than authorized. The deportation hearing was held on September 24, 1973 before an Immigration Judge. At the hearing the alien was represented by counsel, and the assistance of an official Service interpreter was provided to insure full and complete understanding by the alien.

During the deportation hearing Walters admitted the factual allegations in the Order to Show Cause (R. 6, pp. 1-4), but nonetheless, contested deportability on the grounds that he had been arrested without a warrant and without reasonable cause. However, after the Immigration Judge noted that there was no evidence before him which had been seized at the arrest, Walters' counsel withdrew his claim based upon an illegal search (R. 6, p. 15).[1] The alien did press the contention that the deportation hearing should be terminated because the arrest was illegal (R. 6, pp. 15-16). Specifically, the alien alleged that his arrest was illegal because it was conducted without a warrant and based on information obtained from an unreliable informant, to wit, his wife.

In *toto*, the evidence presented at the deportation hearing consisted of: (1) the Order to Show Cause (R. 7); (2) a copy of the alien's arrival and departure record (Form I-94) obtained from the Service's central office (R. 6, p. 3); (3) the alien's notice of motion (R. 8); (4) the Notice of Rights Form signed by the alien at the time of his initial apprehension (R. 6, p. 24) and (5) the alien's testimony including his admission of the factual allegations contained in the Order to Show Cause (R. 6, pp. 1-4).

---

[1] Indeed all papers taken at the time of the arrest were returned to Walters before the hearing. (R. 6, pp. 16-17)

On September 25, 1973 the Immigration Judge delivered a written decision finding the alien deportable as charged; he ordered the alien deported to his native country, and denied the alien's application for voluntary departure pursuant to Section 244(e) of the Act, 8 U.S.C. § 1254(e). He reasons for his discretionary refusal to grant voluntary departure were set forth in the decision and rested primarily upon the alien's efforts to bring his alien wife into the United States in violation of the immigration laws (R. 5).

On September 26, 1973 the alien filed a timely appeal from the Immigration Judge's decision to the Board of Immigration Appeals (the "Board") (R. 4), contending that the Service arrested him without a warrant and without probable cause and therefore that the order of deportation should be dismissed. On December 18, 1974 the Board affirmed the decision of the Immigration Judge, finding the order of deportation properly supported in the record by clear, convincing and unequivocal evidence. Furthermore, the Board found no impropriety in the interrogation, arrest or search of the alien. Also rejected was the alien's claim that the deportation proceedings should be invalidated because of that arrest. Finally, the Board affirmed the Immigration Judge's discretionary refusal to grant Walters the privilege of voluntary departure in lieu of enforced deportation (R. 1).

On January 6, 1975 Walters filed this petition for review alleging a violation of his rights under the Fourth and Fifth Amendments. Since the filing of this petition Walters has enjoyed the automatic stay of deportation provided by Section 106a of the Act, 8 U.S.C. § 1105a.

Petitioner's arrest

The apprehension of Walters by the Service resulted from the following events. After approximately one and one half years of illegal residence Walters attempted to have his wife, Isabel Jimenez, smuggled into the United States across the Canadian-United States border by enlisting the aid of a co-worker. His wife traveled to Canada and remained there for approximately eight days (R. 6, pp. 20-21, 26-27). No entry documents were issued by the American Consulate in Canada to the spouse in order that she might legally enter the United States. Walter's wife was apprehended at the Canadian-American border during her attempt to enter the United States on or about the early morning of September 14, 1973. She was on her way to meet Walters at the Villa Nova Hotel, in Buffalo, New York. Walters admitted that he was waiting at this hotel while his co-worker attempted to bring Isabel Jimenez into the country (R. 6, p. 21). At the time of her apprehension, Walter's wife stated that he was an alien and was awaiting her illegal arrival at the hotel in Buffalo, New York (R. 6, pp. 21, 24-25).

As a result of that information the Service sent two immigration officers to conduct an immediate field investigation.

At about 1:43 a.m.[2] these officers arrived at the hotel, knocked on Walter's door, and asked to be admitted. Walters conceded that the officers immediately identified themselves, that all conversations with him were conducted in Spanish and that they were understood by him (R. 6, pp. 7-10, 16, 18, 19). Walters also conceded that the officers handed him Form I-214, Notice of Rights. This

---

[2] This is two minutes before the time shown for service of Form 1-214 (Hearing Exhibit 4). Walters testified that the arrest occurred approximately one hour earlier. The time discrepancy is without material consequence.

notice, which was written in Spanish and was concededly understood by Walters, explained the alien's right to counsel, and his right to remain silent (R. 6, pp. 9, 23, 24). Walters testified that the officers requested him to sign the statement, and that he did so voluntarily. Walters concedes that prior to his arrest he told the Immigration Officers he was a native of Chile, and that his immigration papers were at his home in Tarrytown, New York (R. 6, p. 7).

As indicated above, the evidence against Walters at the deportation hearing consisted solely of: (1) his own admission of the factual allegations in the order to show cause; (2) an immigration document, Form I-94, from the Service's Central Office files showing Walters' arrival on January 22, 1972 as a visitor for pleasure, authorized to remain in the United States only until February 25, 1972. No statement or document obtained at the time of Walters' apprehension was used or introduced at the hearing to support a finding of deportability.

Relevant Statutory Provisions

Section 287 of the Immigration and Nationality Act 8 U.S.C. § 1352, provides in part:

> Sec. 287. (a) Any officer or employee of the service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the

alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

Section 106(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1105a(a) provides in part:

> The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. § 1031 et seq.) shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 242(b) of this Act or comparable provisions of any prior act, except that—
>
> * * * * *
>
> (4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

ARGUMENT

The arrest of the petitioner was lawful and does not render the deportation proceeding below void ab initio.

The alien argues that his apprehension by Immigration Officers in the early morning of September 14, 1973 constituted an illegal arrest because it was undertaken without a warrant and on the basis of an unreliable informer. Further, he contends that an unlawful arrest requires a vacation of the order of deportation. The alien's position is untenable: first, because the arrest was legal and secondly, because its invalidity would not vitiate an otherwise valid deportation proceeding.

A. The statutory authority of immigration officers to interrogate and arrest aliens illegally resid- in the United States.

Central to any discussion concerning Walters' arrest on September 14, 1973 are the powers conferred upon immigration officers by Section 287(a)(1) and (2) of the Act. Subsection (1) of that statute empowers immigration officers to interrogate, without a warrant, any alien or person believed to be an alien as to his right to be or remain in this country. This statutory authority, and temporary detention accompanying interrogation pursuant to Section 287(a)(1), have been repeatedly upheld as a constitutionally permissible power to enforce the provisions of the Immigration and Nationality Act. *Cheung Tin Wong* v. *Immigration and Naturalization Service*, 468 F.2d 1123 (D.C. Cir. 1972); *Au Yi Lau and Tit Tit Wong* v. *Immigration and Naturalization Service*, 445 F.2d 217 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971); *Yam Sang Kwai* v. *Immigration and Naturalization Service*, 411 F.2d 683 (D.C. Cir), *cert. denied*, 396 U.S. 877 (1969). The Courts have often declared that officers in the normal course of their duties

may approach and question persons as to possible violations, even though they then have insufficient grounds for arrest. Thus the arrests that follow can be lawful. *Terry* v. *Ohio*, 392 U.S. 1, 22 (1968); *Yam Sang Kwai* v. *Immigration and Naturalization Service*, *supra* at 686, 687; *Au Yi Lau* v. *Immigration and Naturalization Service*, *supra* at 222.

In addition to the interrogation powers referred to above, Section 287(a)(2) of the Act empowers an immigration officer, without a warrant,

> To arrest any alien in the United States if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

That subsection thus requires the joinder of two elements to justify an arrest without a warrant: (1) reason to believe that the alien is in the United States illegally; (2) reason to believe that the arrested alien is likely to escape before an arrest warrant can be obtained. The "reason to believe", standard referred to in this statute perhaps can be substantially equated with "probable cause" which traditionally underlies criminal arrests.

B. The interrogation and arrest of Walters were lawful.

It is submitted that information supplied by Walters' wife when she was apprehended provided the arresting officers with sufficient reason to believe that Walters was unlawfully in the United States, and that an arrest was justified under Section 287(a)(2) without any additional corroborating evidence. The information proffered by peti-

tioner's wife does not raise traditional issues of professional informant reliability. Compare *United States* v. *Burke*, Docket No. 75-1021 (2d Cir. May 15, 1975) slip opinion at 3574-3577.

Alternatively, the information supplied by Walters' wife and the subsequent confirmation of that information by the officers' independent investigation at the hotel pursuant to Section 287(a)(1) amply afforded sufficient "reason to believe" that he was in the United States in violation of the law and subject to arrest. Walters was questioned only after his wife was caught in an effort to illegally enter the United States across the Canadian border. When apprehended she stated to the immigration authorities that she was enroute to meeting her alien husband who was awaiting her arrival at the Villa Nova Hotel in Buffalo, New York. Immigration officials proceeded to the hotel and upon their arrival the officers found Walters; confirmed his wife's statement that he was an alien and further, learned that Walters was without immigration documents verifying his lawful presence. The questioning without a warrant was wholly proper under Section 287(a)(1) of the Act, which permits interrogation of "any alien or any person believed to be an alien as to his right to be or remain in the United States". Reliance on the information furnished by petitioner's wife is a more than sufficient basis for such interrogation. See *Au Li Lau* v. *Immigration and Naturalization Service*, 445 F.2d 217, 223 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971) (anonymous tip constituted a sufficient basis for interrogation).

In short, Walters' admission of alienage, the apprehension of his wife while attempting to illegally enter the United States, and his failure to produce immigration papers showing he was lawfully in the United States gave the officers reason to believe that Walters was unlawfully in the

United States.[3] Therefore, the first requirement of a warrantless arrest pursuant to Section 287(a)(2) was satisfied either in reliance upon the wife's information alone or on the basis of the officers' independent investigation at the hotel following the spouse's apprehension.

The second of the two elements in Section 287(a)(2) of the Act can be disposed of quickly. Having been informed by Walters' wife that he was awaiting her arrival at the hotel after an attempt at illegal entry, and having confirmed this information by questioning him pursuant to Section 287(a)(1) of the Act, only a foolhardy officer would have left the hotel to obtain a warrant, with any rational expectation of finding Walters still there when he returned to serve it.[4]

---

[3] In *Cheung Tin Wong* v. *United States Immigration and Naturalization Service*, 468 F.2d 1123, 1128 (D.C. Cir. 1972), wherein the immigration officer initially had only a basis for interrogation and temporary detention of the alien, the court stated that the additional factor of a failure to produce immigration identification documents gave the officer a reasonable belief the alien was illegally in the country, and, therefore, justified his subsequent arrest. Compare, *Yam Sang Kwai* v. *Immigration and Naturalization Service*, 411 F.2d 683, 687 (D.C. Cir.), *cert. denied*, 396 U.S. 877 (1969) (probable cause based upon receipt of conflicting identification documents.)

[4] Alternatively, assuming the immigration officers had determined to effectuate the arrest without questioning Walters, it would be unreasonable to expect them to obtain a warrant before proceeding with the arrest. Having apprehended Walters' wife, the officers had obvious reason to believe that they interrupted her scheduled arrival at the hotel. Under these circumstances, the officers had adequate reason to believe that if they awaited the issuance of a warrant Walters, alarmed by the non-appearance of his wife, might leave the hotel and escape.

C. The deportation order is supported by clear, unequivocal, and convincing evidence untainted by any illegal arrest.

Even assuming, arguendo, that the arrest was illegal, Walters would not be entitled to the termination of his deportation. The petitioner's argument would have validity only if it were established that the evidence underlying the deportation order was itself obtained in violation of law. It is well settled that irregularities in the arrest alone do not vitiate the deportation order if that order was properly substantiated. This general rule has long been recognized by the Supreme Court, and has been repeatedly upheld by the courts in cases involving deportation proceedings. *Frisbie* v. *Collins,* 342 U.S. 519 (1952); *Bilokumsky* v. *Tod,* 263 U.S. 149 (1923); *Ker* v. *Illinois,* 119 U.S. 436 (1886); *LaFranca* v. *Immigration and Naturalization Service,* 413 F.2d 686, (2d Cir., 1969); *Guzman-Flores* v. *Immigration and Naturalization Service,* 496 F.2d 1245 (7th Cir., 1974); *Shu Fuk Cheung* v. *Immigration and Naturalization Service,* 476 F.2d 1180 (8th Cir., 1973); *Vlissidis* v. *Anadell,* 262 F.2d 398 (7th Cir., 1959).

In *Vlissidis* v. *Anadell, supra,* at 400, the court observed:

> Evidence obtained as the result of an unlawful arrest may be suppressed, but we know of no authority for holding a deportation proceeding such as we are here considering to thus become null and void.

and in *Klissas* v. *Immigration and Naturalization Service,* 361 F.2d 529 (D.C. Cir., 1966) the court specifically held, in the face of a challenge comparable to that in the instant case, that the deportation order was adequately supported by untainted evidence. Even if an arrest was illegal, the mere fact that the authorities got the "body" of an alien illegally would not make the proceeding to deport him the fruit of the poisonous tree. This would not be the case when evidence seized as the result of an illegal arrest was

sought to be used in a proceeding. *Huerta-Cabrera* v *Immigration and Naturalization Service,* 466 F.2d 759, 761 (7th Cir., 1972).[5]

If the rule were otherwise, aliens in the petitioner's position could permanently immunize themselves from deportation simply by showing that their initial apprehension by an immigration officer was defective. No such absurd result is required or contemplated by the Act or the Constitution.

The petitioner was found deportable as an alien who had been admitted as a nonimmigrant visitor for pleasure until February 25, 1972 and who remained in the United States beyond that date without authority. At the deportation hearing before an Immigration Judge the petitioner voluntarily conceded the factual allegations contained in the Order to Show Cause of September 14, 1973, *i.e.,* that he was admitted solely as a nonimmigrant for pleasure authorized to remain in the United States until February 25, 1972, and that he remained beyond that date without authority. Thus the order for the petitioner's deportation resulted from his own admissions while he was represented by counsel. Compare, *Klissas* v. *Immigration and Naturalization Service,* 361 F.2d 529 (D.C. Cir., 1966). In this case the Immigration Judge did not rely upon any state-

---

[5] Opposing counsel's brief erroneously relies on *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), to support his contention that the arrest in the instant case was illegal and therefore the deportation proceedings should be rendered *void ab initio. Almeida-Sanchez* considered the reasonableness of an automobile search pursuant to Section 287(a)(3), 8 U.S.C. 1357(a)(3). Furthermore, the sole contention on appeal was that the marihuana which was uncovered during the unconstitutional search should not have been admitted as evidence against him in the criminal proceedings. As noted *infra* the finding of deportability in this case did not rest upon any evidence arising from Walters' arrest. Furthermore, we submit that the arrest in the instant case was in total conformity with the constitutional protections recently discussed in *United States* v. *Brignoni-Ponce,* No. 74-114 (U.S. June 30, 1975).

ment or other evidence seized at the time of the petitioner's arrest to establish his deportability. As this Court stated in *LaFranca* v. *Immigration and Naturalization Service*, *supra*, at 689:

> ". . . [petitioner's] deportability was conceded at the hearing. The Immigration and Naturalization Service did not rely upon any statement taken or evidence seized at the time of his arrest. Under these circumstances, even if the arrest without a warrant were illegal this would not invalidate the subsequent deportation proceedings."

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York,
Attorney for Respondent.

THOMAS H. BELOTE,
Special Assistant United States Attorney.

NAOMI REICE BUCHWALD,
Assistant United States Attorney,
Of Counsel.

★ U. S. Government Printing Office 1975— 614—350—086

Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Lillian Dickson being duly sworn, deposes and says that s he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 9th day of JULY 1975 she served 3 copies of the within

BRIEF FOR THE RESPONDENT

by placing the same in a properly postpaid franked envelope addressed:

WILLIAM H. OLTARSH, ESQ.
225 Broadway
New York, N.Y. 10007

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Lillian Dickson

Sworn to before me this
9 day of July 1975

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1977